Office - Supreme Court, U. S.
FILED
FEB 1 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 518

EDWARD G. DOUGHERTY,

Petitioner,

vs.

GENERAL MOTORS CORPORATION, BUICK, OLDSMOBILE, PONTIAC PLANT, LINDEN DIVISION, LINDEN, NEW JERSEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CARPENTER, GILMOUR & DWYER,
JAMES D. CARPENTER,
Attorneys for Respondent,
75 Montgomery Street,
Jersey City 2, New Jersey.

HENRY M. HOGAN,
Of Counsel.

PATRICK A. DWYER,
THOMAS L. MORRISSEY,
JOHN BACKES,
MILTON A. DAUBER,
On the Brief.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
COUNTERSTATEMENT OF THE CASE	1
COUNTERSTATEMENT OF QUESTION INVOLVED	4
ARGUMENT:	
INTRODUCTORY	4
POINT I. The Court of Appeals Correctly Construed and Applied the Statute in Question	5
POINT II. The Case at Bar is not an Appropriate One for the Exercise of This Court's Discretionary Jurisdiction	9
A. The Instant Case Involves only the Application of a Settled Rule to Particular Facts	9
B. The Question here in Issue has been Harmoniously Decided by all of the Courts of Appeals which Have Ruled upon it	11
C. Petitioner has Failed to Make an Adequate Suggestion of the Importance of the Questions Involved	12
CONCLUSION	13

Table of Citations.

Cases.

	PAGE
Aeronautical Industrial District Lodge 727 v. *Campbell*, 337 U. S. 521 (1949)	5, 7, 8, 9, 11, 12
Alabama Power Co. v. *Ickes*, 302 U. S. 464 (1938)	10
Dwyer v. *Crosby Co.*, 167 F.2d 567 (2d Cir. 1948)	11
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946)	7, 8, 11
Harvey et al. v. *Braniff Int'l Airways, Inc.*, 164 F.2d 521 (5th Cir. 1947)	12
In re Wil-low Cafeterias, Inc., 111 F.2d 429 (2d Cir. 1940)	9
MacLaughlin v. *Union Switch & Signal Co.*, 166 F.2d 46 (3d Cir. 1948)	9
Nevins v. *Curtiss-Wright Corp.*, 172 F.2d 535 (6th Cir. 1949)	12
Seattle Star, Inc. v. *Randolph*, 168 F.2d 274 (9th Cir. 1948)	12
Siaskiewicz v. *General Electric Co.*, 166 F.2d 463 (2d Cir. 1948)	8, 11
Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 (1937)	10

Statutes.

Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U. S. C. App. §308 (1946)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 518

EDWARD G. DOUGHERTY,

Petitioner,

vs.

GENERAL MOTORS CORPORATION, BUICK, OLDSMOBILE, PONTIAC PLANT, LINDEN DIVISION, LINDEN, NEW JERSEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTERSTATEMENT OF THE CASE.

Petitioner, in his statement of the case, has failed to call attention to certain important facts and has glossed over others which respondent feels cannot be ignored in considering the petition under review.

This case, as petitioner points out, was tried before the United States District Court upon an agreed statement of facts. Therein it was stipulated:

> (1) Vacation pay and vacation benefits were at all times in question the subject of annual negotia-

tion and of separate annual agreement between respondent and petitioner's union (R. 11, 26). Accordingly, at the time of petitioner's induction into the armed forces on January 30, 1943, as in prior and subsequent years, the only established rule and practice in respect of vacation pay and benefits was that of annually negotiating between respondent and petitioner's union a new and different vacation agreement (R. 20, 35).

(2) At the time of his induction, petitioner was paid all of the vacation pay which had accrued to him and to which he was entitled (R. 14, 23, 30).

(3) From January 30, 1943, the date of his induction, until June 3, 1946, the date of his reinstatement, petitioner was not on the payroll of or working for respondent, and he did not receive any wages from respondent during this period (R. 18, 34).

(4) On June 3, 1946, petitioner was reinstated by respondent to a position of like seniority, status and pay to that held by him prior to his entry into the armed forces (R. 12, 28).

(5) In accordance with its annual practice, petitioner's union negotiated with respondent a new vacation agreement for the year 1946. By the terms of that agreement, vacation pay allowances for 1946 were computed on the basis of an employee's gross earnings during 1945 (R. 19, 34). Petitioner, because he did not work for respondent during 1945, did not receive any vacation pay in 1946 under the vacation agreement for that year (R. 19, 20, 35).

In addition to the foregoing stipulated matter, the District Court had before it the provisions of the collective bargaining agreements between respondent and petitioner's union relating to vacations and leaves of absence in effect

during the years 1942 to 1946 (R. 6, 9-20, 26). Under these agreements employees were granted leaves of absence without loss of seniority for reasons of illness or the demands of union business (R. 39). Also, the contracts contemplated possible layoffs due to lack of work and took care to preserve seniority rights in such event (R. 38, 39). For example, paragraph 64 of the 1946 agreement protected an employee with five years or more service from loss of his accumulated seniority although laid off for a period up to 5 years (R. 38). Paragraphs 104 and 105 of that agreement provided for formal leaves of absence without loss of seniority, and paragraphs 106 and 108 provided for sick leaves upon the same terms (R. 38, 39). Paragraphs 109 and 110 provided for leaves of absence up to one year when taken in connection with union business (R. 39, 40). Respondent calls attention to these provisions of the contract because they show concretely the numerous occasions for the non-veteran's absence from work. In any of these events a furloughed non-veteran employee would have been ineligible for vacation pay under the 1946 agreement in the same manner and to the same extent as was petitioner.

The District Court found, *inter alia*, that the 1946 collective bargaining agreement did not discriminate against petitioner's rights guaranteed him by the terms of the Selective Training and Service Act of 1940, 54 STAT. 890, as amended, 50 U. S. C. APP. § 308 (1946), and that to accord him vacation rights in 1946, the year of his reinstatement, would favor him as a furloughed employee over his fellow workers (R. 36).

The Court of Appeals for the Third Circuit, in its opinion unanimously affirming the decision of the District Court, called attention to the fact that petitioner had not even alleged an intentional discrimination (R. 44). It found that

respondent and petitioner's union, in the negotiation of the 1946 vacation agreement, had honestly endeavored to establish a fair vacation standard for all employees (R. 44). Moreover, the Court of Appeals held that where, as here, the intent and operation of the contract did not place veterans in a position inferior to that of non-veterans on leave of absence, the Court could not legally impose a vacation provision different from that bargained and agreed upon (R. 45). "Dougherty," it held, "cannot gain legal relief from a provision which was intended to apply to veterans and non-veterans alike and which was not 'a skillful device of hostility to veterans' " (R. 44).

COUNTERSTATEMENT OF QUESTION INVOLVED.

Whether the 1946 vacation agreement entered into between respondent and petitioner's union, which provided for vacation pay in 1946 based upon 1945 earnings and which affected equally and without discrimination veterans and non-veterans on furlough or leave of absence during 1945, was valid under the Selective Training and Service Act of 1940, as amended.

ARGUMENT.

Introductory.

The Court of Appeals decided the instant case in accordance with both the applicable Statute and the decisions of this Court. The instant case, moreover, is not an appropriate one for certiorari since it presents no other problem than the application of a settled principle to particular facts, and the facts upon which the case turns have been found in respondent's favor by both the District

Court and the Court of Appeals. Finally, there is unanimity of opinion among the Circuits upon the question presented and upon related questions involving the same principle, and there is no element in the instant case which presents this Court with an appropriate occasion for enunciating a general rule of law.

POINT I.

The Court of Appeals Correctly Construed and Applied the Statute in Question.

The first specification of error urged by petitioner reflects a misconception of the Court of Appeals' decision. That Court did not find, as is asserted, that petitioner or any other veteran employee would have received vacation pay under the 1946 agreement but for his absence in military service. Nor did it find that non-veteran employees were guaranteed 1946 vacation pay under that agreement. On the contrary, what the Court of Appeals held was that under the terms of the 1946 agreement veteran and non-veteran employees on furlough or leave of absence during 1945 were all ineligible for 1946 vacation pay, equally and without discrimination. Its opinion reflects a clear recognition of the fact that even had petitioner never been in service he might well have been idle in 1945 for any one of numerous reasons and thus have forfeited any right to vacation pay in 1946.

It is respondent's respectful contention that *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521 (1949) is dispositive of petitioner's remaining specifications of error, wherein he charges in effect that the Act was intended not only to guarantee petitioner a position of

equality with non-veteran employees on furlough or leave of absence but rather to accord him a favored status superior to theirs.

The Court of Appeals unanimously found that the 1946 vacation agreement of which petitioner complains was honestly entered into by respondent and petitioner's union with the intention of setting up a fair vacation standard for all members of the union, veterans as well as non-veterans. It pertinently noted that petitioner does not charge intentional discrimination. Rather, his explanation for basing 1946 vacation payments upon 1945 earnings, to wit, the elimination thereby of the 1946 portion of a strike period when no employees had any earnings, bespeaks fairness and honesty of purpose. The Court of Appeals properly observed that the 1946 requirement of earnings in 1945 not only was intended to, but did in fact, operate equally as to veterans and non-veterans. It was not, said the Court, " 'a skillful device of hostility to veterans' ". It had no anti-veteran objective.

Both the District Court and the Court of Appeals observed that acceptance of petitioner's contention would compel the carving out of a special exception as to veterans which would favor them over non-veteran employees on furlough or leave of absence. The decision of both the District Court and the Court of Appeals that such was not the purpose of the Selective Training and Service Act is in harmony with the holding of this Court that

> "In other words, the Act gives him the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force on whose behalf successive collective agreements are

> made.[1] In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough,' but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275." (Footnote supplied.) *Aeronautical Industrial District Lodge 727* v. *Campbell, supra.*

Petitioner has urged, at page 9 of the Petition for Certiorari, that the instant case falls within the "escalator" principal announced in *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* Respondent submits that such a view is erroneous. The *Fishgold* case held that the returning veteran is entitled, not merely to the seniority actually accrued before entering service, but also to that which he would have accumulated if he had stayed with the company. Such a rule is consonant with the statute, §8 (c) providing for an absolute accumulation of seniority during military absence. But §8 (c) also provides that "incidental benefits" (which all parties and Courts here involved have treated as including vacation pay) shall be granted to veterans in accordance with the rules applicable to employees on furlough or leave of absence. Thus the plain statutory language indicates that while a veteran must be permitted to accumulate seniority while in service,

---

[1] Dougherty's rights at the time of his induction and upon his restoration were precisely the same as those of the petitioner in the *Aeronautical District Lodge* case, wherein this Court pertinently noted

> "Kirk's rights, including seniority, before he entered the service were derived from the agreement of 1941. So, likewise, were his rights, including seniority, as an employee on furlough defined by the agreement of 1945, inasmuch as that agreement in no wise disadvantaged his position because he was in the military service."

he is entitled to other benefits incidental to his employment only to the extent that they are accorded to non-veteran employees on furlough or leave of absence. As pointed out in *Aeronautical Industrial District Lodge 727* v. *Campbell, supra,* the escalator doctrine of the *Fishgold* case was not intended to rigidify the collective bargaining process, nor to show to the returning veteran any favoritism as against other furloughed employees.

Petititoner erroneously urges that the escalator principle requires that time in military service is to be considered as time on the job for all purposes. However, it is axiomatic that the mere absence from the job necessitated by military service renders impossible a literal return to *status quo* in every respect. Many benefits of employment are dependent upon considerations other than seniority alone and their enjoyment requires on the part of the beneficiary the actual performance of work, the contribution to a fund, or the like. In fact this Court pointed out in the *Fishgold* case that Congress made restoration as *nearly* a complete substitute for the original job *as possible.* In recognition of the great difficulties involved, Congress under Section 8 (c) provided that the returning veteran should have the status and enjoy the benefits of an employee on furlough or leave of absence. Thus, Congress set up a practicable and objective standard and one which precludes application of the seniority escalator principle in respect of benefits based on considerations other than length of service alone.

It should be further noted that under the collective bargaining agreement here in litigation vacation pay is treated as compensation for work already performed. This accords with judicial treatment of the matter. *Siaskiewicz* v. *General Electric Co.,* 166 F.2d 463 (2d Cir. 1948);

MacLaughlin v. *Union Switch & Signal Co.*, 166 F.2nd 46 (3rd Cir. 1948); *In re Wil-low Cafeterias*, 111 F.2d 429 (2d Cir. 1940). To allow recovery in the instant case, therefore, would be to require respondent to pay veterans for work never performed by them. Respondent respectfully submits that Congress did not intend, by the enactment of the Selective Training and Service Act, to sanction any such result.

POINT II.

The Case at Bar is Not an Appropriate One for the Exercise of This Court's Discretionary Jurisdiction.

A. The Instant Case Involves Only the Application of a Settled Rule to Particular Facts.

Under the decision of this Court in *Aeronautical Industrial District Lodge 727* v. *Campbell, supra,* a collective bargaining agreement which satisfies two basic conditions does not violate the Statute even though a veteran fails to obtain certain benefits under it by reason of his being on furlough while in military service. The first condition is that there be no actual intent to discriminate against a veteran merely by reason of his having been in military service. The second condition, which is perhaps merely an evidentiary element of the first, is that the contract clauses in dispute have been drawn in order to further the welfare of employees generally, consonant with the spirit and purpose of collective bargaining. Thus, the Court of Appeals for the Third Circuit properly treated the case as turning upon the existence or nonexistence of a discriminatory intent or effect. Such intention and effect must necessarily turn upon the facts of the particular case, and the instant

case does not present a fact pattern of such common occurrence as to impel this Court to grant certiorari.

The relevant facts on which this case turns, moreover, have been found in respondent's favor by both the District Court and the Court of Appeals. The District Court found that "the collective bargaining agreement, dated March 19, 1946, * * * did not discriminate against petitioner's rights guaranteed him by the terms of the Selective Training and Service Act * * *" (R. 36). Although the District Court set this up as a conclusion of law, respondent submits that it is actually a finding of one of the ultimate facts in the case. The District Court found as an ultimate fact that respondent's conduct met the factual standard of conduct contemplated by the Statute. The Court of Appeals in its opinion found that the bargaining agreement here in dispute was an attempt to set up a fair standard for determining the vacation pay of all employees and was not a " 'skillful device of hostility to veterans' " (R. 43-45). That Court further found that not only was there no discriminatory intent, but also that the contract was nondiscriminatory in its operation (R. 45).

It should be particularly noted that this Court has frequently characterized as a finding of fact within the scope of the Two-Court rule a conclusion, often expressed in the statutory language itself, that the factual conditions upon which a statute predicates the granting or denial of legal relief have been met. E. g., *Virginia Railway Company* v. *System Federation No. 40,* 300 U. S. 515 (1937); cf. *Alabama Power Company* v. *Ickes,* 302 U. S. 464 (1938). The lower court findings in the cited cases present a ready analogy to the finding of the District Court in the case at bar. Since here the Court of Appeals concurred in the

District Court's finding, the issue of discrimination, being essentially one of fact, is not subject to review in this Court.

While it has been suggested that the *Aeronautical Lodge* case involved questions of seniority under the Act, and that this Court has never ruled on a vacation pay case, such a distinction is one of accidental fact and not of principle. Section 8 (b) (B) provides that "such employer shall restore such person to such position or to a position of like seniority, status and pay". Section 8 (c) provides that a person so restored shall be considered as having been on furlough and "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough". Examination of this language shows no such deviation between the two sections as to make the criteria of discrimination in a seniority case inapplicable to a vacation pay case. In fact, this Court has construed the two sections as an organic whole. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* The instant case, therefore, does not present any novel question calling for adjudication by this Court.

B. The Question Here in Issue has been Harmoniously Decided by all of the Courts of Appeals which Have Ruled upon it.

Contrary to the assertion at page 8 of the Petition, there is no confusion among the lower courts. The precise problem here raised in construction of section 8 of the Act has been ruled upon by the Second and Third Circuits. The Second Circuit in *Dwyer* v. *Crosby Co.*, 167 F.2d 567 (2d Cir. 1948) and *Siaskiewicz* v. *General Electric Co., supra,* laid down a rule identical with that adopted by the Court of Appeals for the Third Circuit in the instant case. The Court of Appeals for the Third Circuit cited in its opinion

these two cases from the Second Circuit (R. 45). Parallel decisions on related questions arising under the same section of the Act have been rendered by the Courts of Appeals for the Fifth, Sixth and Ninth Circuits. *Harvey et al.* v. *Braniff Int'l Airways, Inc.*, 164 F.2d 521 (5th Cir. 1947); *Nevins* v. *Curtiss-Wright Corp.*, 172 F.2d 535 (6th Cir. 1949) (promotions, where based on skill and efficiency); *Seattle Star, Inc.* v. *Randolph*, 168 F.2d 274 (9th Cir. 1948) (severance pay, where based on time actually worked). In so far as the absence of conflict among the Circuits will justify the refusal of certiorari, it is respectfully urged that the petition in the instant case should be denied.

C. *Petitioner has Failed to Make an Adequate Suggestion of the Importance of the Questions Involved.*

So far as importance of the question may be deemed to consist in novelty, the instant case presents no important question. As submitted above, the general rule is well settled by *Aeronautical Lodge*, nor is there any suggestion of record that a decision by this Court in the instant case is necessary for the efficient administration of the federal judicial system. Although petitioner has adverted to the impendance of 70,000 virtually identical law suits, respondent submits that there is no reliable evidence of the instant case being so typical in its facts, or of the question having presented such difficulty to the lower federal courts, as to require an authoritative settlement of the problem in this Court. In fact, the unanimity of opinion among the Circuits which have ruled upon the problem indicates that it is a relatively simple one. Moreover, since the general rule is well-settled, an opinion of this Court in the instant case would be interpreted as attaching especial significance

to its particular facts. Such an interpretation by the District Courts and Courts of Appeals would result in an undesirable rigidity in the handling of subsequent cases below. Those courts might feel erroneously precluded from deciding subsequent cases upon their own facts, and might tend to ignore the applicable legal principle in a strained effort to match those facts with the ones now at bar.

CONCLUSION.

For the reasons herein set forth, respondent respectfully urges that the petition for a writ of certiorari should be denied.

CARPENTER, GILMOUR & DWYER,
JAMES D. CARPENTER,
Attorneys for Respondent.

HENRY M. HOGAN,
Of Counsel.

PATRICK A. DWYER,
THOMAS L. MORRISSEY,
JOHN BACKES,
MILTON A. DAUBER,
On the Brief.